BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARCIA L. EMERY, Claimant, v. STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant.	**IC 2009-012270** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed August 9, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing in Boise, Idaho, on December 9, 2011. Lynn M. Luker of Boise represented Claimant. Paul J. Augustine of Boise represented Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF). Claimant's time-of-injury employer and its surety entered into a lump sum settlement with Claimant prior to the hearing in this matter. The remaining parties submitted oral and documentary evidence, took two post-hearing depositions and filed post-hearing briefs. The matter came under advisement on March 1, 2012 and is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant is totally and permanently disabled under the odd-lot doctrine;
2. Whether ISIF is liable for a portion of Claimant's permanent disability; and
3. Apportionment under the *Carey* formula.

CONTENTIONS OF THE PARTIES

Claimant fell at work on May 6, 2009, fracturing her right kneecap, and necessitating a total knee replacement (TKA). As a result of the TKA, Claimant asserts that she is totally and permanently disabled as an odd-lot worker because she is unable to perform work other than that which is so limited in quality, dependability, or quantity that a reasonably stable labor market for it does not exist. Claimant contends that ISIF is liable for a portion of her total disability benefits because she had pre-existing arthritis in her right knee which constituted a hindrance to employment and which combined with her May 6, 2009 injury to cause her permanent total disability.

ISIF argues first that Claimant is not totally and permanently disabled as an odd-lot worker because work for which she is qualified and which is compatible with her medical restrictions is available in her local labor market. Alternatively, ISIF argues that Claimant's pre-existing arthritis did not constitute a subjective hindrance or obstacle to her employment prior to the accident. Finally, ISIF asserts that Claimant cannot meet the "combines with" requirement for imposing ISIF liability.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Douglas Crum, C.D.M.S., taken at hearing;

2. Claimant's exhibits 1 through 13, admitted at hearing;

3. ISIF's exhibits A through F, admitted at hearing; and

4. The post-hearing depositions of Stanley W. Moss, M.D., taken December 20, 2011 and William C. Jordan, C.R.C., C.D.M.S., taken January 3, 2012.

FINDINGS OF FACT

BACKGROUND

1. At the time of hearing, Claimant was 65 years of age and living in Boise, Idaho. She was born and raised in Nebraska. At the age of 16, Claimant's family placed her and her sister in a children's home, as the family was unable to care for the girls. Claimant had difficulty in school, particularly with reading comprehension. With the assistance of a tutor she was able to graduate from high school. Claimant still has difficulty with reading comprehension, particularly books, but does somewhat better with newspapers and magazines.

2. In 1989 Claimant attempted to improve her work skills by enrolling in a year-long secretarial course at Shadow Mountain Business School in Boise. Claimant did not do well, and at the end of the year could only type twelve words per minute. Claimant has no computer skills, does not own a personal computer or digital device, and is unapologetic about her lack of computer skills and firm in her intention to stay that way.

WORK HISTORY

3. After her graduation from high school in Nebraska, Claimant entered a training program with Goodwill Industries, where she remained for almost a year. For a short time she worked as a file clerk for an insurance company in Omaha, then worked on an assembly line for a company that made hair accessories.

4. Claimant married in 1965, and quit working outside her home when she was expecting her first child. In 1969 Claimant and her family moved to Idaho. Claimant returned to the workforce in 1983 in telemarketing, where she was quite successful. From 1983 until 1994 she worked off and on as a telemarketer in the evenings and provided childcare for her children and her friends' children during the day. Claimant eventually took a management position in

telemarketing. Claimant found the management responsibilities stressful, and when she had an opportunity to apply for a position as a school bus monitor, she jumped at the chance.

5. In 1994 Claimant started working as a school bus monitor. Claimant primarily worked on buses that transported special needs children, though occasionally she served as a monitor on traditional buses. Claimant loved working with the special needs children and was very good at her job. Although Claimant's duties remained the same, she worked for a number of different school bus contractors during her fourteen years as a bus monitor. At the time of her injury, Claimant earned $10.95 per hour working for Employer.

6. As part of her employment, Claimant was subject to regular Department of Transportation (DOT) physical exams, and had to be able to perform certain tasks, including getting in and out of the bus quickly, lifting students into safety harnesses, and evacuating the bus in the event of emergency. Claimant failed one DOT physical because of her high blood pressure, but Employer took no action against Claimant as a result of the failed physical. Claimant was always able to demonstrate her ability to perform life and safety duties, but previous employers had not timed those requirements. Employer notified its employees that by October 2009 employees would be required to perform and pass a timed physical dexterity test. Claimant had no doubt that she could perform the required maneuvers, but doubted that she could perform them within the time limits Employer set. Claimant had not yet taken her physical dexterity test when she fractured her patella. After her injury and her TKA, Claimant's surgeon prohibited her from taking the test.

RELEVANT MEDICAL HISTORY

7. Many years before the instant accident, Claimant tripped over a planter at her home and injured her right knee. This may have occurred in the mid-1980s or the mid-1990s—

Claimant was uncertain of the date, and attempts to pinpoint the date by using temporal landmarks such as the age of her children or her grandchildren only resulted in more confusion. Claimant testified that Dr. Moss treated her at that time and told her that she had some degenerative arthritis in her knee and she should probably have surgery.[1] Claimant professed a vehement aversion to doctors in general, and did not pursue further medical care for her injury. She took OTC anti-inflammatories when necessary, and her knee seemed to improve.

8. Some years later, (she could not reliably identify a time-range) Claimant began to experience some pain and swelling in her knee. These problems were extant at least five years prior to the subject injury, and it seems likely that her right knee bothered her for some time even before 2004 or so. This recurrent chronic knee pain caused Claimant to limp on occasion, and required frequent home care with ice, heat, and anti-inflammatories. The described knee problems did not cause Claimant to miss any work, and she continued performing her job as a bus monitor.

9. On April 22, 2009, Claimant tripped on a rug just inside Employer's offices, and fell on her right knee. The fall caused her right knee to become more painful, but she declined medical care and continued working. She tried using a cane, but her supervisor told her that she could not use a cane at work. The subject accident occurred approximately two weeks later.

10. Claimant has a long history of uncontrolled Type II diabetes. She is not insulin-dependent, but has a poor history regarding monitoring her condition. Claimant has a history of hypertension and hyperlipidemia, neither of which is well controlled. Claimant is generally non-compliant regarding dietary and medication regimes. Claimant has on-going problems with fluid

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[1] Dr. Moss had no record of treating Claimant prior to her 2009 accident, and no independent recollection of her as a patient in the mid-1980s or 1990s.

retention which exacerbate her hypertension. Claimant's physicians are monitoring Claimant for possible congestive heart failure, but Claimant has declined medical testing to confirm the diagnosis. Claimant has poor dentition. She is missing most of her teeth, which affects both her appearance and her ability to speak clearly.

SUBJECT ACCIDENT

11. On May 6, 2009, Claimant was preparing to start her afternoon shift. She came into Employer's building to get a drink of water from the fountain, and when she bent to do so, she felt and heard a loud pop in her knee. Claimant denied serious injury but was unable to walk due to the pain, so Employer told her to go to the doctor. Claimant drove herself to the doctor, but was unable to drive herself home after Dr. Gibson diagnosed her injury.

POST-INJURY MEDICAL CARE

12. Claimant first saw Michael Gibson, M.D., at the occupational medicine clinic at St. Alphonsus Medical Group. Dr. Gibson diagnosed a right patella fracture and severe tri-compartmental osteoarthritis. He referred Claimant to David Hassinger, M.D., an orthopedist. Dr. Hassinger treated Claimant's fracture conservatively with a hinged knee brace locked in extension until early July 2009, when Claimant asked Dr. Hassinger to transfer her care to Dr. Moss.

13. On July 2, 2009, Claimant saw Kyle Palmer, M.D., an orthopedic surgeon, for a second opinion about her knee. It is not clear how Claimant came to see Dr. Palmer, but Surety's nurse case manager accompanied her. Dr. Palmer described Claimant's medical situation as "unfortunate," with a non-healing patella fracture superimposed upon an osteoporotic and severely arthritic knee in a patient who is morbidly obese and diabetic. He discussed several options for treatment, both surgical and non-surgical, none of which were ideal. When Claimant

told Dr. Palmer that she had previously treated with Dr. Moss, he suggested that Surety transfer Claimant's care to Dr. Moss.

14. Claimant began treating with Dr. Moss in late July 2009. On her first visit with Dr. Moss, he expressed deep concern regarding appropriate treatment for Claimant. The patella fracture made a total knee replacement a less than optimal option unless and until the patella had healed, which could take up to a year. Dr. Moss discussed several other options, none of which were optimal, and all of which were likely to result in some significant impairment due to both the pre-injury condition of Claimant's knee compounded by the patella fracture.

15. By mid-August 2009, Dr. Moss was convinced, based on a recent CT scan, that Claimant's patella had not healed and he did not believe it would heal given the poor condition of her bones before the injury. If it did heal, he felt it likely that it would come apart during the stress of rehab following a TKA. Dr. Moss discussed several options with Claimant, and they decided the best option was to perform a TKA together with a trabecular bone patella replacement or a patellectomy, depending upon surgical findings.

16. Dr. Moss performed Claimant's surgery on September 28, 2009. In addition to the planned TKA, he was able to put in an artificial patella to replace Claimant's fractured one.

17. All things considered, Claimant made a remarkable recovery. Dr. Moss released her from care on April 6, 2010. He rated her whole person permanent impairment at 33% based on the *AMA Guide to Permanent Impairment*, 5th ed. (*AMA Guides*, 5th). Dr. Moss imposed permanent restrictions:

> Her restrictions are no running, no jumping, no squatting, and no crawling. If she kneels on a rare occasion she has to use a pillow or pad to kneel on. She can walk as much as her comfort allows. She can ride a bike. She can do office work or desk work but she can't be required to do the PT test required to be a bus aide and she can't go up and down the bus stairs multiple times. She can't run or jump

> which is part of the test as an aide and she has restrictions of no lifting over 30 pounds.

CE 5, p. 26. Dr. Moss' restrictions precluded Claimant from returning to her time-of-injury position. Dr. Moss attributed 40% of Claimant's impairment (13%) to her pre-existing degenerative arthritis, and 60% of her impairment (20%) to her industrial accident.

VOCATIONAL EVIDENCE

Darrell Holloway, ICRD

18. In early August, 2009, after her injury but prior to her TKA, Surety referred Claimant to the Industrial Commission Rehabilitation Division (ICRD) for vocational rehabilitation/return to work assistance. ICRD assigned Claimant's case to Darrell Holloway, ICRD rehabilitation consultant. Mr. Holloway met with Claimant and Employer and thereafter monitored Claimant's medical progress. Before and after her surgery, Employer gave Claimant modified-duty work. In late December 2009, when it became evident that Claimant would likely not be able to return to her job as a bus monitor, Mr. Holloway suggested she pursue Social Security Disability (SSD) benefits. Claimant applied for SSD but social security denied her request. In the spring of 2010, she began receiving regular social security benefits. Employer provided modified duty until Dr. Moss determined that Claimant had reached maximum medical improvement (MMI) and that she would not be able to return to her time-of-injury position as a school bus monitor. Employer terminated Claimant on April 12, 2010.

19. Mr. Holloway suggested that Claimant should apply for unemployment benefits and take advantage of the assistance that Job Service could offer, specifically noting the upcoming implementation of a program focusing on services for older workers. Claimant did as Mr. Holloway suggested. The older workers' job program had nothing to offer Claimant. During the time Claimant received unemployment benefits, she engaged in the required job

search without success. In retrospect, Claimant's job search during this period lacked direction and did little to optimize her employment opportunities. Claimant did not take advantage of the listings of job openings because she could not use the computer. Instead, she made repeated visits to a narrow range of potential employers that she believed would have jobs that suited her. Claimant made a number of visits to various facilities of the Idaho Youth Ranch, Goodwill Industries, and St. Vincent de Paul. She contacted several laundromats to see if she could be an attendant, made repeated contacts at Albertson's Express concerning cashier jobs, and inquired about a greeter job with Wal-Mart.

20. The hearing record is clear that Claimant did not know how to conduct a job search, how to approach potential employers, or how to follow up on applications. Her limited experience and skills, her complete lack of any computer skills, and her personal presentation already constituted significant obstacles to re-employment. With little or no guidance in making an effective job search, it was not surprising that Claimant could not find employment.

21. In early December 2010, Mr. Holloway reviewed Mr. Crum's vocational report prepared in anticipation of Claimant's upcoming workers' compensation hearing, and closed Claimant's ICRD file, noting that Claimant had not returned to work and had exhausted available vocational resources.

Douglas Crum, C.D.M.S.

22. Claimant retained the services of Douglas Crum, C.D.M.S., to evaluate the extent of her disability considering both medical and non-medical factors. The Commission is well acquainted with Mr. Crum and his qualifications and the Referee will not restate them here.

23. In preparing his October 27, 2010 report, Mr. Crum reviewed the medical records of Drs. Palmer and Moss, including relevant radiology reports, together with Mr. Holloway's

ICRD notes. Mr. Crum met with Claimant for a personal interview in early September 2010.

24. Mr. Crum determined, based on Claimant's statements, that her pre-existing arthritic knee constituted a subjective hindrance to her employment. The knee was painful, limited the speed and distance she could ambulate, and caused her to walk with an observable limp.

25. Mr. Crum estimated that prior to the subject injury, Claimant had access to about 5.2% of jobs extant in the Boise Metropolitan Statistical Area.[2] This figure reflected Claimant's light-duty work history, and her limited skill set. Mr. Crum then performed a second post-injury labor market analysis for Claimant based on Dr. Moss' restrictions, and Claimant's observable medical limitations (difficulty ambulating, standing, and getting into and out of her chair). Mr. Crum concluded:

> Based on this second analysis, it appears to me that [Claimant] will not be able to return to any well known, regularly occurring occupation in her labor market. In my opinion, [Claimant] does not have skills and abilities sufficient to make her a viable candidate in sedentary clerical and sales jobs, including telemarketing jobs.
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> I note that [Claimant] has been looking for work since she was released back to employment. She has worked with industrial commission field consultant Darrell Holloway. She has also attempted to obtain placement assistance from the Idaho Department of Labor's older worker program. They were unable to provide any significant assistance due to a lack of employers with appropriate jobs.
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> In my opinion, further attempts to secure work are, more likely than not, going to be futile.
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> In my opinion, the industrial injury of April 22, 2009,[3] combined with her pre-existing arthritis and other non-medical factors, has resulted in total and permanent disability.

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[2] In his October 2010 report, Mr. Crum calculated Claimant's pre-injury labor market at 11.8% of the jobs in the Boise Metropolitan Statistical Area. At hearing, Mr. Crum noted that his initial calculation was off by a factor of more than two and should actually be 5.2%.

[3] April 22, 2009 was the date Claimant tripped on the rug at work, not the date of the subject industrial injury. Although the date of the patella fracture is identified as the date of injury, the

CE 8, p. 8.

William Jordan, C.R.C., C.D.M.S.

26. Employer/Surety retained William Jordan as their vocational expert. Mr. Jordan prepared his vocational evaluation before Employer/Surety entered into a lump sum settlement with Claimant. ISIF offered Mr. Jordan's report as one of its proposed exhibits and deposed Mr. Jordan post-hearing. The Commission is well acquainted with Mr. Jordan's education, experience, and qualifications and the Referee will not restate them here.

27. In preparing his report, Mr. Jordan reviewed the relevant medical records and interviewed Claimant to determine her education, skills, and work history. Mr. Jordan noted that during the time Claimant was receiving unemployment benefits following her termination by Employer, she was complying with the job search requirements of the Department of Labor, but her active job search stopped about the same time her unemployment benefits ended. Mr. Jordan observed that Claimant's job search was desultory, and "reflects the bare minimum activity that is required by the Department of Labor for continued unemployment benefits." DE D, p. 50.

28. Taking into account Claimant's work history, wage history, education, medical restrictions, her perception of her medical restrictions, and her social skills, Mr. Jordan identified a number of jobs ordinarily available in the Boise labor market that he believed Claimant could perform within her restrictions. The following are jobs (not necessarily job openings) that Mr. Jordan identified and researched for which he believed Claimant was qualified:

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subtext seems to be that the April fall might have started the process which resulted in the frank fracture in early May.

Employer	Position
*Developmental Concepts	Developmental Technician
**Wal-Mart	Greeter, Gas Station Attendant, Apparel Clerk
**Edwards Theater	Box Office Worker/Ticket Taker
*Clearwater Research	Market Research Interviewer
Life Care Center of Valley View	Activity Assistant
*Wess Publishing, LLC	Telemarketer
American Home Companion	Companion
*Select Staffing	Telemarketer
*St. Luke's RMC	Cashier
**Meridian School District #2	School Noon Duty and School Crossing Guard
*Is hiring	**Is accepting applications

Mr. Jordan sent descriptions for a representative sample of the jobs to Dr. Moss for his review. Dr. Moss approved the following positions as being within Claimant's restrictions:

Clerical/Office Worker-Reception	Greeter
Market Research Interviewer/Phone Worker	Clothing Sorter
Demonstrator/Promoter	Gas Station Attendant
Ticket Taker	Cashier
Companion	Teacher Aide
Receptionist	Child Care Provider (with modifications)

Mr. Jordan then made direct employer contacts with ten businesses that employed individuals within the approved job descriptions. (*Id.*, at pp. 43-46). For each identified position, Mr. Jordan spoke with an employer contact regarding the job requirements. In addition, he shared information regarding Claimant's age, her knee injury, work restrictions, and Claimant's work history.

29. Mr. Jordan calculated that before her injury Claimant had access to approximately 38% of the labor market. This included sedentary or light exertional levels in mostly unskilled jobs. Mr. Jordan calculated that as a result of her injury, Claimant lost access to only two of the jobs in her pre-injury labor market (bus monitor and file clerk) for a reduction of 5% of her pre-

injury labor market.[4] With regard to wage loss, Mr. Jordan calculated that pre-injury she earned $10.95 per hour. Claimant worked approximately 1,500 to 1,600 hours per year, rather than the normal 2080-hour work year, giving her an effective hourly rate of $8.33 per hour. The average wage of jobs Mr. Jordan identified as suitable for Claimant ranged from $8.45 to $10.26 per hour. Using an average wage loss of $1.60 per hour (8.45 + 10.26 / 2), this represents an average wage loss of 15%.

30. Mr. Jordan concluded that Claimant was "in a retirement status" *Id.*, but that there were jobs available to her in the labor market compatible with her skills and within her physical capabilities. Claimant could work full-time or part-time and supplement her social security retirement benefits. Mr. Jordan concluded that Claimant's total permanent disability attributable to the industrial injury was 30% inclusive of the 20% PPI attributed to the accident by Dr. Moss.

31. Mr. Jordan did not discuss what impact, if any, medical factors not related to the industrial accident and non-medical factors might have on Claimant's employability.

DISCUSSION AND FURTHER FINDINGS

Disability

32. Since a finding of total permanent disability is a prerequisite to any ISIF liability, Claimant must first show she is totally and permanently disabled.

Permanent and Total Disability

There are two methods by which a claimant can demonstrate that he or she is totally and permanently disabled. The first method is by proving that his or her medical impairment

[4] There is a large discrepancy in the pre-injury labor market estimates of Mr. Crum (5.2%) and Mr. Jordan (38%). Mr. Crum considered light and sedentary unskilled jobs, and Mr. Jordan included semi-skilled and limited medium exertional positions, but that does not seem to account for the 32.8 point difference in their pre-injury labor market figures.

together with the relevant nonmedical factors total 100%. If a claimant has met this burden, then total and permanent disability has been established.

100% Disability

33. Claimant does not contend that her medical impairments together with relevant non-medical factors total 100%, and the Commission agrees.

Odd-Lot

34. The second method of establishing total and permanent disability is by proving that, in the event he or she is something less than 100% disabled, he or she fits within the definition of an odd-lot worker. *Boley v. State Industrial Special Indemnity Fund*, 130 Idaho 278, 281, 939 P.2d 854, 857 (1997). An odd-lot worker is one "so injured the he can perform no services other than those which are so limited in quality, dependability or quantity that a reasonably stable market for them does not exist." *Bybee v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 76, 81, 921 P.2d 1200, 1205 (1996), *citing Arnold v. Splendid Bakery*, 88 Idaho 455, 463, 401 P.2d 271, 276 (1965). Such workers are not regularly employable "in any well-known branch of the labor market – absent a business boom, the sympathy of a particular employer or friends, temporary good luck, or a superhuman effort on their part." *Carey v. Clearwater County Road Department*, 107 Idaho 109, 112, 686 P.2d 54, 57 (1984), *citing Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 406, 565 P.2d 1360, 1363 (1963).

The burden of establishing odd-lot status rests upon the claimant. *Dumaw v. J. L. Norton Logging*, 118 Idaho at 153, 795 P.2d at 315 (1990). An injured worker may prove that he or she is an odd-lot worker in one of three ways: (1) by showing he or she has attempted other types of employment without success; (2) by showing that he or she or vocational counselors or

employment agencies on his or her behalf have searched for other suitable work and such work is not available; or, (3) by showing that any effort to find suitable employment would be futile. *Hamilton v. Ted Beamis Logging and Construction*, 127 Idaho 221, 224, 899 P.2d 434, 437 (1995).

Findings regarding the issue of disability rely on both medical and non-medical factors. The Commission looks to the medical evidence for opinions regarding impairment and work restrictions, and to the vocational evidence for opinions on employability and loss of earning capacity. To the extent that disability is an issue, however, the determination of whether a claimant is an odd-lot worker is a factual determination within the discretion of the Commission. *Thompson v. Motel 6*, 135 Idaho 373, 17 P.3d 874 (2001).

35. In this proceeding, Claimant argues she is an odd-lot worker.

Medical Factors

36. The only rating of Claimant's permanent impairment was that done by Dr. Moss, and it is unrebutted. Dr. Moss found Claimant to have 33% whole person permanent impairment, which included both her pre-existing arthritic right knee condition and impairment attributable to her May 2009 accident. Claimant's other medical conditions, including hyperlipidemia, hypertension, Type II diabetes, and poor dentition were not rated.

At hearing, Claimant testified to post-accident difficulties with standing for long periods of time, walking, and with her stability/balance. Claimant's restrictions include no running, jumping, squatting, crawling, walking only as her comfort allows, kneeling on a rare occasion with support, no lifting over 30 pounds, and finally, Dr. Moss forbid Claimant from even attempting her Employer's work physical training test.

Non-Medical Factors

Employability

37. Darrell Holloway worked with Claimant after her accident, and for approximately nine months after Dr. Moss released her to return to work. From the ICRD notes it appears that Mr. Holloway had little to offer Claimant once Dr. Moss released her to return to sedentary work. He suggested Claimant contact the Department of Labor regarding its older workers program and that Claimant apply for social security disability benefits. He closed Claimant's file in December 2010 after reviewing Mr. Crum's report.

38. Claimant retained Mr. Crum to evaluate her employability. Mr. Crum estimated that even prior to her industrial injury Claimant had access to only 5.2% of her labor market, which included primarily light-duty, unskilled work. Although her arthritic knee caused her some pain and some mobility problems, her pre-injury labor market was constrained mainly by non-medical factors—her age, her limited education, her lack of computer or keyboarding skills, her communication style, and her appearance. Following her injury, and its attendant restrictions, along with her increased instability and decreased mobility, Mr. Crum concluded that it would be futile for Claimant to look for work. He observed that Claimant's long and unsuccessful job search supported his conclusion, noting that she made a good faith effort and was pursuing jobs that were appropriate though she was not doing so very effectively.

39. In his testimony at hearing, Mr. Crum also discussed at length some of the specific positions that Mr. Jordan identified as being appropriate for Claimant post-accident. Mr. Crum did not believe Claimant was employable in a clerical/receptionist position because of her appearance, lack of communication skills, and lack of computer skills. He opined that Claimant was not competitive for telemarketing and telephone research jobs for many of the same reasons.

He discounted food demonstration because of Claimant's appearance, her inability to carry equipment from her car into the store and set it up, and her inability to stand for long periods of time. Mr. Crum thought it unlikely Claimant could get work as a cashier, gas station attendant, or ticket taker because of the need to use a computerized cash register, and because such work can be fast-paced and high pressure during high volume periods. Mr. Crum opined that the physical requirements for personal aide or companion work would, in most cases, be outside of Claimant's restrictions. With regard to a job as a teacher's aide, Mr. Crum noted that certified teachers are looking for jobs as teacher's aides, and Claimant was not a competitive candidate for such work. Mr. Crum acknowledged that Claimant would not have been competitive for many of these same jobs even prior to her accident.

40. ISIF retained Mr. Jordan to prepare a forensic employability report. Mr. Jordan opined that before her accident, Claimant had access to 38% of the labor market and lost access to 5% of that market after her accident. Mr. Jordan combined the 5% labor market loss with a 15% loss of wage earning capacity and concluded that Claimant's disability in excess of her impairment was only 10%.

Other Relevant Factors

41. In his report and in his testimony, Mr. Crum discussed a number of non-medical factors that he believed significantly affected Claimant's employability. Mr. Jordan generally avoided discussing such factors, though he acknowledged that Claimant was in "retirement status," which certainly conveys the notion that he did not believe Claimant was particularly interested in working if she could not work at her time-of-injury position.

Finding on Disability

42. Claimant has carried her burden of proving that she is totally and permanently disabled as an odd-lot worker by establishing that further efforts to find suitable work would be futile. This finding is supported, in part, by the opinions expressed by Mr. Holloway and Mr. Crum. Mr. Jordan's determination that Claimant had access to 38% of the labor market prior to her injury, or that she lost access to only 5% of her labor market following her accident, is not credible. Prior to her accident, Claimant was in her early sixties, lacked education, had virtually no transferrable skills, and had worked only in sedentary and light exertion positions. Her lack of keyboarding and computer skills took her out of the running for many entry-level positions, and especially the telephone work that she had performed years before. Other factors that could negatively affect Claimant's employability, such as her weight, poor dentition, and poor communication skills all pre-existed her injury. Mr. Jordan's employability analysis consistently overrates Claimant's abilities and underestimates her deficits. Mr. Jordan was also overly optimistic about Claimant's post-injury employability. In addition to all of the factors previously discussed, following her accident Claimant was 65, unsteady on her feet, used a cane, could stand for only short periods of time, could walk only short distances without rest, and was prohibited from kneeling, stooping, squatting, or lifting more than 30 pounds.

43. The Referee also had the opportunity to observe Claimant during the course of the hearing. The Referee observed that Claimant was morbidly obese, used a cane, and walked slowly and with difficulty. She had trouble seating herself in a chair and struggled getting up from the chair. Although Dr. Moss did not impose restrictions on the length of time Claimant could stand or the distance she could walk, the Referee believed Claimant's testimony that she could stand for only ten to fifteen minutes without discomfort, or that she can walk only 50 feet without stopping to rest. DE E, pp. 66-67. Claimant's communication style is excessively

loquacious and rambling. At hearing, and in her deposition, her attorney frequently had to stop her and refocus her attention back to the question before her.

44. The Commission finds that considering all of the relevant factors, including Mr. Holloway's and Mr. Crum's testimony, it would be futile for Claimant to continue to search for work. Claimant has shown a *prima facie* case for odd-lot status through futility.

45. ISIF argues that evidence that a job existed, within Claimant's restrictions and for which Claimant was qualified, is sufficient to overcome Claimant's *prima facie* case for odd-lot status, citing to *Lyons v. Industrial Special Indemnity Fund*, 98 Idaho 403, 565 P.2d 1360 (1977). In *Lyons*, the Idaho Supreme Court held that once a Claimant has established a *prima facie* case for odd-lot status, the burden shifts to the Defendants to establish that the Claimant is employable.

> Therefore, the Fund [ISIF] must show that some kind of suitable work is *regularly and continuously* available to appellant.
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> In meeting its burden, it will not be sufficient for the Fund to merely show that appellant is able to perform some type of work. Idaho Code § 72-425 requires that the Commission consider the economic and social environment in which the claimant lives. To be consistent with this requirement it is necessary that the Fund introduce evidence that there is an actual job within a reasonable distance from appellant's home which he is able to perform or for which he can be trained. In addition, the Fund must show that appellant has a reasonable opportunity to be employed at that job. *It is of no significance that there is a job appellant is capable of performing if he would in fact not be considered for the job due to his injuries, lack of education, lack of training, or other reasons*.

Id., at p.407. Emphasis added.

In the course of Mr. Jordan's post-hearing deposition, and again in briefing, there was much discussion concerning a job opening for a developmental technician at an organization identified as Developmental Concepts. Mr. Jordan testified that he had spoken with the office manager at the firm concerning Claimant. Mr. Jordan averred that the position was open at the

time of Claimant's hearing, was within Claimant's restrictions, and that the job was a good match for Claimant. Claimant testified that she applied for the position, but did not hear back. Mr. Jordan speculated that Claimant had not spoken to the appropriate person at the company.

46. Mr. Jordan's testimony does not establish that there is an actual job for which Claimant is likely to be hired. What it does establish is that Mr. Jordan had a discussion with Christina, an office manager at the organization. It is not clear that Christina is the hiring authority. Mr. Jordan advised Christina of Claimant's work as a bus monitor, and Christina expressed her *feeling* that Claimant's skills would be a *good match.* Mr. Jordan advised Christina of Claimant's injury and restrictions, and Christina *thought* that the developmental technician position *might work best* for Claimant. Christina told Mr. Jordan that the firm would *accept* an application from Claimant. On this evidence, it is a bit of a reach to say this is a job Claimant is likely to get, especially since she submitted an application in person and did not hear back. This evidence is insufficient to overcome Claimant's *prima facie* case that she is an odd-lot worker.

ISIF Liability

47. ISIF liability is governed by the provisions of Idaho Code § 72-332. That section sets out four elements that a claimant must prove in order to establish ISIF liability:

1. That there was a pre-existing impairment;
2. That the impairment was manifest;
3. That the impairment was a subjective hindrance; and
4. That the pre-existing impairment combined with the last accident to cause total permanent disability.

Dumaw v. J. L. Norton Logging, 118 Idaho 150, 155, 795 P.2d 312, 317 (1990). A claimant's failure to prove any of the required elements relieves ISIF of all liability on the claim. ISIF asserts that Claimant has failed to establish it has any liability on her claim. ISIF relies on three alternative arguments, any one of which, if proven, absolve it of liability. First, ISIF asserts that Claimant is not totally and permanently disabled. If the Commission finds that Claimant is totally and permanently disabled, ISIF contends that Claimant cannot establish the third element of ISIF liability—that Claimant's pre-existing arthritic knee was a subjective hindrance to her employment as the concept is defined by Idaho Code § 72-422, and explicated in *Smith v. J.B. Parson Company*, 127 Idaho 937, 943, 908 P.2d 1244, 1250 (1996). Finally, ISIF argues that Claimant cannot meet the fourth requirement for ISIF liability—that the pre-existing impairment *combined with* the last accident to cause total her total permanent disability.

The parties did not dispute the first two elements prerequisite for ISIF liability, i.e. that Claimant had a pre-existing impairment, and that Claimant's impairment was manifest. The Commission agrees. The Commission will now address the remaining elements—"subjective hindrance" and "combines with"—necessary for ISIF liability.

Subjective Hindrance

48. The Idaho Supreme Court set out the definitive explanation of the "subjective hindrance" language in *Archer v. Bonners Ferry Datsun*, 117 Idaho 166, 172, 786 P.2d 557, 563 (1990):

> Under this test, evidence of the claimant's attitude toward the preexisting condition, the claimant's medical condition before and after the injury or disease for which compensation is sought, nonmedical factors concerning the claimant, as well as expert opinions and other evidence concerning the effect of the preexisting condition on the claimant's employability will all be admissible. No longer will the result turn merely on the claimant's attitude toward the condition and expert opinion concerning whether a reasonable employer would consider the claimant's condition to make it more likely that any subsequent injury would

> make the claimant totally and permanently disabled. The result now will be determined by the Commission's weighing of the evidence presented on the question of whether or not the preexisting condition constituted a hindrance or obstacle to employment for the particular claimant.

ISIF argues that it is not liable on this claim because Claimant cannot establish the third prong of ISIF liability: that her pre-existing osteoarthritis was a subjective hindrance to her employment prior to her last industrial accident. Claimant points to the opinion of Dr. Moss that if he had seen Claimant prior to the industrial accident, he would have imposed the same restrictions for her arthritic knee that he imposed *after* the TKA. This, Claimant asserts, is sufficient proof that her pre-existing condition was a subjective hindrance.

49. Claimant had never been given any physician-imposed restrictions prior to the subject accident. In fact, although Claimant received medical care for her right knee in the years prior to the subject accident, the record fails to reflect that she was ever given a diagnosis relating to her right knee prior to the May 6, 2009 accident. Regardless, medical evaluation conducted since May 6, 2009 unequivocally establishes that prior to the subject accident Claimant suffered from "end-stage" osteoarthritis of the right knee. Further, although Claimant is a stoic individual, and resistant to suggestion that her pre-injury knee condition affected her ability to engage in physical activity, the more persuasive evidence of record establishes that even prior to the subject accident, Claimant was significantly limited by her right knee.

Claimant testified that her right knee was sometimes painful, and sometimes caused her to walk with a limp. She frequently used ice, heat, and anti-inflammatories to treat it at home. Claimant limped at work, but she insisted her knee problems never prevented her from performing her job. Although Claimant never missed time from work because of her right knee prior to the accident, it is equally clear that her right knee had been problematic enough in the past to cause her to seek medical care from Dr. Moss, and for Dr. Moss to propose right knee

surgery. Claimant's stoicism is commendable, but her stubborn appraisal of her condition is not realistic. This is made nowhere more clear than in the opinions of Dr. Moss, who is of the view that Claimant's current limitations are no different than the limitations she had prior to the subject accident.

50. Claimant's pre-existing osteoarthritis did constitute a subjective hindrance to her employment.

Combines With

51. The fourth prong of the *Dumaw* test requires that Claimant's pre-existing condition combine with her industrial injury to cause total disability.

52. Claimant argues that her pre-existing conditions combined with her knee injury from the last industrial accident to render her totally and permanently disabled. ISIF argues that Claimant's knee injury does not combine with her pre-existing conditions, as Claimant's restrictions from the knee injury have left her in the same place vocationally. Dr. Moss opined that if he had seen Claimant prior to the industrial accident, he would have imposed the same restrictions for her arthritic knee that he imposed *after* the TKA.

53. Mr. Crum reviewed Dr. Moss's April 6, 2010 significant restrictions, discussed above, and concluded that Claimant's pre-existing condition combined with her last accident to render her totally and completely disabled. However, Dr. Moss did not attribute these problems to Claimant's total knee surgery. Claimant's total knee surgery was extremely successful, leaving Claimant with a better range of motion on examination. Rather, Claimant was having difficulties ambulating for years prior to the subject accident, and should have had the above significant restrictions during the time she worked for Employer. Unfortunately, Mr. Crum

failed to differentiate between the restrictions Dr. Moss attributed to her pre-injury condition (most, if not all) and those Dr. Moss attributed to her TKA (*de minimus*).

54. Claimant worked hard post-TKA, and has made great progress in recovery. Per Dr. Moss, Claimant is not particularly limited by her knee replacement. Dr. Moss opined that if he had seen Claimant prior to the industrial accident, he would have imposed the same restrictions for her arthritic knee that he imposed *after* the TKA.

55. That Claimant took great joy in her job duties is very apparent. She felt a special calling to work with special needs children as a bus monitor, and was devastated when Dr. Moss precluded her from attempting the physical examination necessary to maintain her employment. While Dr. Moss withheld permission from Claimant to attempt the physical examination post-TKA, Dr. Moss explained that "the fact that [Claimant] was doing it before doesn't mean that she could have actually jumped out of the bus without causing great danger to herself, if she tried that before she had the total knee." Moss Depo. pg. 18, 22-25.

56. Claimant's mobility problems and overall poor health are readily evident to anyone observing her, including the hearing Referee, but Claimant's TKA does not constitute a significant contributor to her condition. Although Claimant's pre-injury labor market was not non-existent, the Commission concludes that that jobs for which she could compete were so limited in quality, dependability or quantity such that she was totally and permanently disabled prior to the subject accident. Claimant's substantial non-industrial medical problems overwhelm the TKA results, and are enough to render her totally and permanently disabled, notwithstanding that she was employed at the time of the accident. In this regard it is important to recall that Claimant's probably could not have continued to satisfy testing requirements for her time-of-injury job, even if the subject accident had not occurred.

57. Claimant has not shown her knee injury combined with her other significant medical conditions to render her totally and permanently disabled.

CONCLUSIONS OF LAW

1. Claimant is totally and permanently disabled as an odd-lot worker.

2. ISIF is not liable for any portion of Claimant's disability.

ORDER

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant is totally and permanently disabled as an odd-lot worker.

2. ISIF is not liable for any portion of Claimant's disability.

3. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this _9th____ day of __August_____, 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

_/s/_____
R.D. Maynard, Commissioner

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _9th__ day of _August_____, 2012, a true and correct copy of the foregoing **FINDINGS, CONCLUSIONS,** and **ORDER** were served by regular United States Mail upon each of the following persons:

LYNN LUKER
PO BOX 190929
BOISE ID 83719

PAUL AUGUSTINE
PO BOX 1521
BOISE ID 83701-1521

_/s/_____